

82-1501

No. \_\_\_\_\_

Office Supreme Court, U.S.

FILED

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ALEXANDER L. STEVAS,  
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1982

AMALIA MUSICO,  
*Petitioner,*  
v.

FRANCIS G. MUSICO, JR., individually and as  
Personal Representative of the Estate of  
Francis G. Musico, deceased,  
*Respondent.*

**PETITION FOR WRIT OF CERTIORARI  
TO THE DISTRICT COURT OF APPEAL  
FOURTH DISTRICT, FLORIDA**

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### **QUESTION PRESENTED**

Is it a denial of full faith and credit for the courts of Florida to give effect to a waiver of marital rights in a prenuptial agreement made in New York, where the waiver is indisputably invalid under the statutes of New York, as construed by the highest court of that state?

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*Respondent.*

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**PETITION FOR WRIT OF CERTIORARI  
TO THE DISTRICT COURT OF APPEAL  
FOURTH DISTRICT, FLORIDA**

---

AMALIA MUSICO petitions for a writ of certiorari to review the decision of the District Court of Appeal, Fourth District, Florida, in this case.

**OPINIONS BELOW**

The opinion of the district court of appeal (App. A 1a) is reported at 422 So.2d 31 (Fla. 4th DCA 1982). The opinion of the trial court (App. B 3a) is not reported.

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\* There are no additional parties in this proceeding.

## **JURISDICTION**

The Florida district court of appeal entered its decision on September 8, 1982. Petitioner timely petitioned for rehearing (App. D 8a) on September 23, 1982, which the court denied (App. E 15a) on December 10, 1982, at which time the judgment became final. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

1. Article 4, § 1 of the United States Constitution provides in pertinent part:

Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State.

2. New York Estates, Powers & Trusts Law § 18-e (1966) provides in pertinent part:

1. Either spouse, during the lifetime of the other, may waive or release a right of election authorized by Section eighteen or Section eighteen-b against a particular last will or testamentary provision described in Section eighteen-a of this chapter, or any last will of the other spouse, whether such will was executed before, on or after September first, nineteen hundred sixty-six. A waiver or release of all rights in the estate of the other spouse is a waiver or release of the right of election as against any last will, or any testamentary provisions described in section eighteen-a of this chapter.

2. To be effective, a waiver or release must be in writing and subscribed by the maker thereof, and acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property.

3. Such a waiver or release is effective, in accordance with its terms, whether

(a) executed before or after the marriage of the spouses;

(b) executed before, on or after September first, nineteen hundred sixty-six;

(c) unilateral in form, executed only by the maker thereof, or bilateral in form, executed by both spouses;

(d) executed with or without consideration;

(e) absolute or conditional.

3. New York Real Prop. Law § 292 states:

Except as otherwise provided by this article, such acknowledgment can be made only by the person who executed the conveyance, and such proof can be made only by some other person, who was a witness of its execution, and at the same time subscribed his name to the conveyance as a witness.

### STATEMENT OF THE CASE

This case arose out of a dispute over a prenuptial agreement (App. F 16a). It was signed by petitioner AMALIA MUSICO ("petitioner") three weeks before her marriage to Francis G. Musico, deceased, whose attorney drafted the document and supervised her signing in his New York office. By its terms, the agreement is "made under and . . . governed by the laws of the State of New York" (App. F 20a). The marriage lasted from December of 1966 until Mr. Musico's death in New York City in January of 1980. The agreement gave her nothing during his lifetime or at his death.

FRANCIS G. MUSICO, JR. ("respondent"), as personal representative of the estate of his late father, instituted probate proceedings in the Circuit Court of Broward County, Florida. Since Mr. Musico's will did not mention his widow, she filed a petition to recover her pretermitted widow's statutory share of his estate. Respondent interposed the prenuptial agreement as a complete bar to recovery.



On January 20, 1981, petitioner filed a motion for summary final judgment as to her entire case, arguing that the agreement was void and of no effect because it was not executed in accordance with the strict requirements of New York law, which required any waiver or release of a right of election to be acknowledged or proved. The trial court denied the motion (App. C 6a, 7a) and the case proceeded to trial. There it was not disputed that the agreement was drafted solely by the husband's personal attorney, Nathan Dinkes, Esq., and that it was not properly executed under New York law before the husband died. The trial court nevertheless denied all relief, holding that an affidavit signed by Dinkes after Musico's death cured the execution defect (App. B 4a).

On July 31, 1981, an appeal was filed in the District Court of Appeal, Fourth District, Florida. On September 8, 1982, that court affirmed the trial court decision. With respect to the defect in execution referred to by petitioner, the appellate court dismissed her argument stating—and thereby raising the point for the first time—that the defect was merely “procedural”:

Moreover, we conclude that appellant's allegations of procedural irregularities in the execution of the agreement are without merit.

[422 So.2d at 32 (App. A 2a).]

Petitioner requested rehearing on September 23, 1982 (App. D 8a), and contended in the third paragraph of her petition for rehearing:

\* \* \* \*

... The significance of *In re Warren's Estate*, 229 N.Y.S.2d 1004 *aff'd*, 236 N.Y.S.2d 628, 187 N.E.2d 478 (N.Y. 1962), has been overlooked. The court in *Warren* held that property rights vest as of the date of death. Therefore, in order for a waiver of marital rights to be effective to bar the election rights of a surviving spouse, it must satisfy the formalities

of execution *prior* to the date of the deceased spouse's death. . . . At best, failure to recognize *Warren* as controlling would be violative of Article IV, Section One of the United States Constitution requiring "full faith and credit" to be given to judicial proceedings of our sister states [App. D 8a].

\* \* \* \*

On December 10, 1982, the court denied the rehearing petition and the judgment became final on that date (App. E 15a).

### BASIS FOR FEDERAL JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257 (3) to review the decision of the District Court of Appeal, Fourth District, Florida, the state court of last resort. Petitioner did not pursue proceedings in the Florida Supreme Court because that court has no jurisdiction to review this case under the Florida constitution and appellate rules promulgated thereunder (See App. G 21a). Thus, the District Court of Appeal, Fourth District, Florida, is the highest court of Florida in which a decision could be had in this case.<sup>1</sup>

### STAGE AT WHICH FEDERAL QUESTION WAS RAISED AND PRESERVED

At trial, petitioner and respondent agreed by written stipulation that New York law governed the substantive rights of the parties, as the agreement itself provided. In construing the effect of the agreement the trial court correctly determined that New York law applied, but

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<sup>1</sup> The only basis for seeking review in the Florida Supreme Court would be that the decision on its face was "expressly and directly" in conflict with another Florida appellate decision. Because the face of the decision disclosed no conflict, petitioner invited the court to acknowledge an express and direct conflict with other Florida appellate decisions. The court declined to acknowledge any such conflict and denied the petition for rehearing without further opinion (App. E 15a).

misconstrued the controlling substantive principles. Thus, an appeal was taken on the basis of the misapplication of New York law. Despite the pre-trial stipulation of the parties and the application of New York law by the trial court (albeit a misapplication of New York law), the Florida appellate court ruled, citing primarily Florida law and never mentioning the New York statute governing waivers of marital rights, that the execution requirements were merely "procedural" (App. A 2a). Thus, the full faith and credit issue was raised for the first time in the Florida appellate court's decision. A petition for rehearing was then filed in which the denial of full faith and credit was challenged (App. D 13a). The petition was denied without opinion (App. E 15a).

## **REASONS FOR GRANTING PETITION**

### **Introductory Statement**

This case presents an important question, the resolution of which is necessary to preserve the integrity of the "full faith and credit" clause of the United States Constitution. It involves the refusal of a Florida appellate court—despite controlling legal principles, the express wording of the agreement in issue, and the stipulation of the parties—to recognize and apply New York law regarding the formal execution requirements for a waiver or release of a marital right of election. This case presents an example of what occurs when the courts of one state fail to recognize substantive rights created by the laws of a married couple's state of origin. The importance of granting certiorari in this case is underscored by the fact that our population has become migratory and marital contracts have become commonplace. It is submitted that when the facts of this case are reviewed in the context of the controlling law, the importance of granting the petition will be evident.

**I. THE WAIVER OF MARITAL RIGHTS AT ISSUE IN THIS CASE IS INDISPUTABLY INVALID UNDER THE STATUTORY LAW OF NEW YORK, AS CONSTRUED BY THE HIGHEST COURT OF THAT STATE.**

The statutory law of New York sets forth the manner of execution of any agreement which may have the effect of waiving marital rights. The statute governing execution of the Musico agreement is N.Y. Estates Powers & Trusts Law § 18-e.<sup>2</sup> It states in pertinent part:

2. To be effective, a waiver or release [of a marital right of election] must be in writing and subscribed by the maker thereof, and acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property.

Thus, any waiver or release of marital rights is void unless it is executed in the manner required by New York law for the recording of a conveyance of real property. *In Re McGlone's Will*, 284 N.Y. 527, 32 N.E.2d 539 (N.Y. 1940), *aff'd*, 314 U.S. 556 (1941).

The New York statute prescribing the acknowledgment or proof required for the recording of a conveyance of real property is N.Y. Real Prop. Law § 292. It states in pertinent part:

. . . [S]uch acknowledgment can be made only by the person who executed the conveyance, and such proof can be made only by some other person, who was a witness of its execution, and at the same time subscribed his name to the conveyance as a witness.

As the statute itself provided, an "acknowledgment" is the required formal confirmation made by the parties

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<sup>2</sup> This was the statute in effect in December of 1966 when petitioner signed the Musico prenuptial agreement. It imposed the same basic restrictions as the current statute, N.Y. Est. Powers & Trusts Law § 5-1.1(f).

signing the instrument under oath that they executed it. In New York this fact must be evidenced by a written certificate of an officer authorized to administer oaths in that state. *Cicerale v. Cicerale*, 85 Misc.2d 1071, 382 N.Y.S.2d 430, *aff'd*, 387 N.Y.S.2d 1022 (N.Y. App. Div. 1976). A "proof" is the confirmation by a subscribing witness that the parties signed it. This must also be made under oath in strict compliance with the statute. *Id.* To be effective, an acknowledgment or proof must be made during the lifetime of the deceased spouse. *In re Warren's Estate*, 299 N.Y.S.2d 1004, *aff'd*, 236 N.Y.S.2d 628, 187 N.E.2d 478 (N.Y. 1962).

Since the waiver in this case was neither acknowledged nor proved prior to the death of Mr. Musico, the waiver is void under New York law.

Although it acknowledged the applicability of New York law, the trial court nevertheless held that the defect in execution was cured by an affidavit of Mr. Musico's attorney, executed after Mr. Musico's death. This obvious misinterpretation of New York law was appealed on the basis of *Warren*.

The *Warren* decision leaves no doubt that under New York law property rights vest at the date of death, *Irrving Trust Co. v. Day*, 314 U.S. 556 (1942), and that a failure to acknowledge or prove a marital contract prior to a spouse's death is not curable thereafter. In *Warren*, a husband and wife entered a separation agreement containing a mutual waiver of the right of election similar to the one now before this Court. After the husband's death, the widow sought to elect against her husband's will on the grounds that the waiver of her right of election was ineffective because it was neither acknowledged nor proved. The trial court ruled that the waiver of the right of election was ineffective because it had not been acknowledged or proved during the husband's lifetime. The decision was affirmed by the New York Supreme Court and again by the New York Court of Appeals.

*Warren* was expressly applied by the New York Supreme Court in the case of *In re Held's Estate*, 24 A.D.2d 506, 261 N.Y.S.2d 674 (1965). Citing *Warren*, the New York Supreme Court unanimously held that an agreement waiving a spouse's right of election was invalid because it was not acknowledged until *after* the decedent's death. It stated:

The separation agreement . . . which contained a waiver and release of each party's right of election against the estate of the other, was not acknowledged or proved in the manner required for the recording of a conveyance of real property . . . The admission by the surviving spouse that he had signed the agreement was made *after* the testatrix' death; and such admission therefore does not constitute an acknowledgment within the meaning of the statute. (Decedent Estate Law, § 18; *Matter of Warren's Estate* . . .)

Since the separation agreement had not been acknowledged prior to the testatrix' death, and since the 'question of whether a surviving spouse has a right to elect to take against the deceased spouse's will should be tested as of the time of the decedent's death' (*Matter of Warren's Estate*, *supra*) it follows that there was no proper waiver of the right of election and that the notice of election here was valid.

[261 N.Y.S.2d at 675.]

Not a single appellate decision since *Warren* suggests even the slightest doubt as to the controlling effect of *Warren*. See, e.g., *In re Kucera*, 73 Misc.2d 456, 342 N.Y.S.2d 812 (1973); see also, *In re Howland's Will*, 284 A.D. 4th 306, 132 N.Y.S.2d 451 (1954) (holding that the statute requires acknowledgment during the lifetime of the spouse and failure to do so voids the agreement).

Because the statutory element of *proof* was never satisfied in this case, the Musico agreement is absolutely void.

As stated in *Warren*, such a result generates an increased respect for the strong public purpose which the strict execution requirements implement. 229 N.Y.S.2d at 1006.

The New York statute and the *Warren* decision and its progeny were presented to the appellate court by petitioner as the only appropriate basis for decision. Respondent did not contend that any law other than the law of the state of New York controlled the formalities of execution. Surprisingly, however, the appellate court held for respondent without referring either to the New York statute or the *Warren* decision. Instead, the appellate court relied principally on Florida decisions as it dismissed the defect in execution of the waiver as a mere "procedural" irregularity. On petition for rehearing, petitioner argued that the appellate court's failure to apply New York law, as enunciated in *Warren*, constituted a denial of full faith and credit. The petition for rehearing was denied.

## II. THE FULL FAITH AND CREDIT CLAUSE PROHIBITS FLORIDA COURTS FROM GIVING EFFECT TO A WAIVER OF MARITAL RIGHTS EXECUTED IN NEW YORK WHEN THAT WAIVER IS INVALID UNDER THE LAWS OF THE STATE OF NEW YORK.

The refusal of the Florida appellate court to apply New York law, as enunciated in *Warren*, to the waiver of marital rights constitutes a denial of full faith and credit. *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178 (1936). In *John Hancock*, this Court recognized that a state statute governing validity of a contract becomes such an integral part of that contract that the full faith and credit clause compels a sister state to recognize the statute as part of the contract itself.

The *John Hancock* case involved a life insurance policy applied for, issued and delivered in New York, where the decedent and his widow resided until his death. After



the decedent's death she moved to Georgia and sued on the policy in state court. The insurer contended that New York law controlled, and denied liability because of false material representations in the policy application. It was undisputed that the application contained false statements and that under New York statutory law, as construed and applied by the courts of New York, the policy was void.

The Georgia trial court overruled the company's contention and permitted the widow to testify that true oral statements had been given regarding the deceased's application information. The jury found for the widow and the Supreme Court of Georgia affirmed. In so doing, the Georgia Supreme Court reasoned that while the validity, form, and effect of a contract are to be determined by the law of the place where the contract is made, the character and extent of remedies and the mode of procedure are to be determined by the law of the forum.<sup>3</sup> The Court then held that the manner and effect of the oral disclosure affected the remedy only, and not validity of the agreement. On this basis, the Georgia Supreme Court concluded that full faith and credit did not require application of New York law. 299 U.S. at 180-81. This Court reversed. It held:

The reasoning of the Georgia Court, and the conclusion reached by it, are not sound. No question of remedy is presented. The Company sets up as a defense a substantive right conferred by a statute of New York. . . To sustain the defense involves merely recognition by the courts of Georgia that the parties have by their contract made in New York subjected themselves to certain conditions prescribed by its statute. . . The statute of New York prescribes, or

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<sup>3</sup> So far as it goes, this remains a correct statement of the law. In *Scudder v. Union National Bank*, 91 U.S. 406 (1876), this Court determined with respect to contracts executed in one state to be given effect in another that (1) matters bearing upon execution, interpretation, and validity are to be determined by the law of the place where the contract is made, and (2) matters relating to procedure depend upon the law of the forum state.



limits, the things which will be effective to create binding contracts. . . , or terms in them. As construed by the highest court of the State, the statute makes the policy with the application annexed the entire contract between the parties. . .

[299 U.S. at 182.]

The Court acknowledged:

In so declaring, the statute enacts a rule of substantive law which became a term of the contract. . .

[*Id.*]

Like the statute in issue in *John Hancock*, the execution statute regarding the strict formalities to be followed in waiving marital rights became an integral part of the Musico agreement and thereby created substantive rights protected by the full faith and credit clause. Moreover, the prenuptial agreement itself states that New York law governs the substantive rights of the parties (App. F, *infra*). Nevertheless, the Florida appellate court improperly characterized the statutory execution requirement as procedural and denied relief. This holding is directly contrary to the New York Supreme Court's characterization of the statutes in *Warren*, which underscores the sound public purpose of the execution requirement. As stated in *Warren*:

It is not novel in the law, however, to find a harsh result where statute or public interest requires strict and full compliance with certain formalities *before rights may be predicated*. By pertinent statutes, some agreements require a writing, wills require witnesses for enforceability, and contracts fully documented and freely made are set aside for usury. In many instances injustice may result from adherence to the statutes; but the applicable statutory requirements of formality were founded on a sound public purpose, and the harshness which sometimes ensues generates increased respect for such statutory requirements and the public purpose which they implement.

The statute here does not use the device of the acknowledgment as merely an easy way of proof, as in the case of a deed or a mortgage. Instruments of that kind are good as against the parties thereto and are enforceable against all who know of them, whether acknowledged or not. But in the case of the waiver of the right of election, it is invalid and of no effect against anyone without the acknowledgment.

[229 N.Y.S.2d at 1006-7, (emphasis added)]

As in *John Hancock*, the state court has denied full faith and credit to the New York statute on the erroneous ground that the statute does not confer substantive rights. Under the authority of *John Hancock*, therefore, the Florida appellate court's holding constitutes a denial of full faith and credit. *Bradford Electric Light Co., Inc. v. Clapper*, 286 U.S. 145 (1932); accord, *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

### III. CERTIORARI IS NECESSARY TO ENSURE PROTECTION OF SUBSTANTIVE RIGHTS OF MIGRATING CITIZENS.

The Florida appellate court's refusal to follow the controlling law of New York regarding execution of the agreement does not involve a mere "procedural" irregularity as characterized by that court in its decision *Musico v. Musico*, 422 So.2d 31 (Fla. 4th DCA 1982), but instead constitutes a denial of an important substantive right, conferred by a New York statute, as construed by the highest court of that state. Migration of citizens between and among sister states today is commonplace, and this is especially so in the sunbelt area. Expanding populations of persons, firms, and corporations frequently bring to their new locale rights that are predicated and governed by statutes and judicial decisions of the highest courts of their states of origin. Nowhere is this phenomenon more evident than among the rapidly migrating population moving from New York to Florida, and perhaps nowhere is it more important to recognize than with respect to the rights of spouses and family members. In-

deed, marital agreements are a coming trend, increasing in fashion and creating a prolific number of problems of their own when parties who have migrated from one state to another agree on a choice of law governing their substantive rights.

This Court's holding in *John Hancock* dictates that the Florida appellate court's refusal to follow controlling New York substantive law in this case is a denial of full faith and credit, and it is submitted that this clearly erroneous refusal requires judicial resolution to assure uniform and just application of constitutionally preserved rights.

### CONCLUSION

The full faith and credit clause of United States Constitution requires the courts of Florida to recognize petitioner's substantive right under the New York statute governing waivers of marital rights, and to uphold that statute in the same manner as it has been upheld in New York by the highest court of that state. Petitioner's rightful claim to the protection of New York law has been denied by the Florida appellate court, and can now be preserved only by this Court. This Petition for Writ of Certiorari should therefore be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the District Court of Appeal

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DISTRICT COURT OF APPEAL OF FLORIDA  
FOURTH DISTRICT

No. 81-1410

AMALIA MUSICO,  
*Appellant/Cross-Appellee,*

v.

FRANCIS G. MUSICO, JR., individually and as Personal  
Representative of the Estate of Francis G. Musico,  
deceased,

*Appellee/Cross-Appellant.*

Sept. 8, 1982

Rehearing Denied Dec. 10, 1982

John R. Hargrove of McCune, Hiaasen, Crum, Ferris  
& Gardner, P.A., Fort Lauderdale, for appellant/cross-  
appellee.

James O. Murphy, Jr., and Douglas K. Silvis of Eng-  
lish, McCaughan & O'Bryan, Fort Lauderdale, for  
appellee/cross-appellant.

PER CURIAM.

This appeal emanates from a probate proceeding in which appellant/surviving spouse contested the validity of an antenuptial agreement executed in New York. The trial court upheld the agreement, finding that appellant had entered into the agreement knowingly, aware of its meaning and significance, and without duress. Although

the testimony on this issue was in conflict, the trial court's findings are supported by substantial competent evidence. Moreover, we conclude that appellant's allegations of procedural irregularities in the execution of the agreement are without merit. See *Weintraub v. Weintraub*, 417 So.2d 629 (1982); *Flagship National Bank of Miami v. King*, 418 So.2d 275 (Fla. 3d DCA, 1982); *Estate of Garcia v. Garcia*, 399 So.2d 486 (Fla. 3d DCA), petition for review denied, 407 So.2d 1103 (Fla.1981); *In re Stegman's Estate*, 42 Misc.2d 273, 247 N.Y.S.2d 727 (Surr.Ct.1964); *In re Maul's Will*, 176 Misc. 170, 26 N.Y.S.2d 847 (Surr. Ct.), *aff'd with opinion*, 262 A.D. 941, 29 N.Y.S.2d 429 (App.Div.1941), *aff'd without opinion*, 287 N.Y. 694, 39 N.E.2d 301 (1942).

Accordingly, the judgment is affirmed.

BERANEK, HURLEY and WALDEN, JJ., concur.

APPENDIX B

Opinion of the Trial Court

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IN THE CIRCUIT COURT  
OF THE 17th JUDICIAL CIRCUIT OF FLORIDA  
IN AND FOR BROWARD COUNTY

Probate #80-0724

IN RE: ESTATE OF FRANCIS G. MUSICO,  
*Deceased.*

JUDGMENT

THIS CAUSE came on for final hearing with the primary issue being the validity or invalidity of a prenuptial agreement between the deceased, FRANCIS G. MUSICO, and his surviving widow, AMALIA MUSICO, petitioner, and the court having considered the evidence, argument of very able counsel and the law, does find:

1. That this court's comments on the applicable law set forth in its March 27, 1981 order on summary judgment and judgment on the pleadings is still appropriate and herein adopted by reference. (Petitioner attaches this March 27, 1981 Order of the Trial Court in Appendix "C").

2. That contrary to petitioner's assertions herein, Florida Statute 689.01 relative to conveyance is not relevant. This cause is in probate and same must be governed by Florida Statute 732.702.

3. That the petitioner, presently 52 years of age, a college graduate and 37 years of age at the time of executing the prenuptial agreement (3 weeks before the marriage herein) entered into said agreement knowingly; that she was fully aware of the meaning and significance

of the agreement; that there was no duress; and that petitioner's complaints about the agreement during the marriage seem to fortify the conclusion that she understood the provisions of the agreement when she executed it.

4. The proof herein is lacking of any fraud or overreaching. The decedent did not misrepresent his assets or the nature of his holdings nor did he conceal any information; there is no evidence that he failed to particularize his assets and liabilities in order to deceive petitioner. The history and approximate one-year relationship between decedent and petitioner prior to marriage demonstrates that petitioner was aware of the fact that decedent was a successful business man close to a millionaire status.

5. It is not within the province of this court to consider the wisdom of petitioner in executing said agreement nor of the deceased likewise waiving any right to petitioner's estate. The fact that the assets of petitioner and the deceased were disproportionate at the time of the execution of the agreement and that the provisions therein for petitioner were inadequate are not alone sufficient to invalidate the agreement. Both under New York and Florida law consideration is not required to have a valid agreement, which agreement the court hereby declares as valid and a waiver of all rights in the estate.

6. Petitioner's claim that the law of New York was not complied with as to the technical requirements relative to a subscribing witness is without merit as after-acknowledgement of an original subscribing witness is provided for by case law regarding prenuptial agreements. Therefore, it is

ORDERED and ADJUDGED that petitioner, AMALIA HORACEK MUSICO, take nothing herein either against FRANCIS G. MUSICO, JR., individually or as personal representative of the estate of FRANCIS G. MUSICO,

5a

deceased, as her petitions for pretermitted spouse status and to set aside homestead real estate are denied.

DONE and ORDERED this 20th day of July, 1981.

/s/ W. Clayton Johnson  
Circuit Judge

Copy furnished counsel:  
John Hargrove  
Douglas K. Silvas



**APPENDIX C**

**Trial Court's Order Denying Petitioner's Motions  
for Summary Judgment**

---

IN THE CIRCUIT COURT  
OF THE 17th JUDICIAL CIRCUIT OF FLORIDA  
IN AND FOR BROWARD COUNTY

80 0724 Johnson

IN RE: ESTATE OF FRANCIS G. MUSICO,  
*Deceased.*

**ORDER DENYING PETITIONER'S  
MOTION FOR SUMMARY JUDGMENT  
AND JUDGMENT ON THE PLEADINGS;  
AND RESPONDENT'S MOTION FOR  
RECONSIDERATION OR REHEARING  
ON PARTIAL SUMMARY JUDGMENT**

This cause came on to be heard on February 12, 1981, upon petitioner-wife's motions for summary judgment as to the validity of the execution and acknowledgment of a prenuptial agreement; and on petitioner-wife's motion for judgment on the pleadings as to homestead property; and on respondent-personal representative's motion for reconsideration of this court's prior ruling on respondent's motion for partial summary judgment as to the applicability of the "Dead-man's Statute". Having examined the pleadings and being otherwise fully advised in the premises, it is

1. ORDERED AND ADJUDGED that petitioner-wife's motion for summary judgment as to the validity of execution of the prenuptial agreement is hereby denied on the basis of *In re: Stegman's Estate*, 247 NYS 2d 727; and *In re: Maul's Estate*, 29 NYS 2d 429, 39 NE 2d 301, both of which speak to prenuptial agreements while petitioner's cases, *Warren's Estate* and *Held's Estate*, speak only to postnuptial separation agreements.

It is further recognized by this court that the New York statutes cited by petitioner are apparently applicable to only postnuptial agreements; and it is further

2. ORDERED AND ADJUDGED that petitioner-wife's motion for judgment on the pleadings as to homestead property is hereby denied on the basis of FSA § 732.702 which appears to eliminate the requirement of two subscribing witnesses and which clearly states that "waiver of 'all rights' or equivalent language . . . is a waiver of all rights to . . . homestead . . . by each spouse . . ." FSA § 732.702(1) (1979). This court further considers the recent cases of *Ford v. Barnes*, 366 So.2d 1235 (1979); *Moxley v. Wickes*, 356 So.2d 839 (1977); and *Carrol v. Dougherty*, 355 So.2d 843 (1978) which, although they relax the acknowledgment requirements as to conveyances, must surely apply to waivers as well as the parties are relinquishing greater rights in a conveyance than a waiver; and it is further

3. ORDERED AND ADJUDGED that respondent's motion for reconsideration on the applicability of the "Dead-man's Statute" is hereby denied for those reasons aforementioned in this court's previous order dated February 3, 1981 denying such motion. Petitioner-wife clearly falls within the exception enunciated in FSA § 90.602(2) and *Briscoe v. Florida National Bank of Miami*, Case No. 80-1048 (Feb. 17, 1981).

DONE AND ORDERED this 27th day of March, 1981.

/s/ W. Clayton Johnson  
Circuit Judge

Copy to:

Douglas K. Silvis  
John Hargrove  
Warren Rosmarin  
Stan Wakshlag  
Robert C. Maland

**APPENDIX D**  
**Petition for Rehearing**

---

**IN THE DISTRICT COURT OF APPEAL**  
**FOURTH DISTRICT OF FLORIDA**

Case No. 81-1410

**AMALIA MUSICO,**  
*Appellant/Cross-Appellee,*

**vs.**

**FRANCIS G. MUSICO, JR.,** individually and as Personal  
Representative of the Estate of Francis G. Musico,  
deceased,

*Appellee/Cross-Appellant.*

**MOTION FOR REHEARING OR**  
**CLARIFICATION AND FOR**  
**REHEARING EN BANC**

Pursuant to Rules 9.330 and 9.331 of the *Florida Rules of Appellate Procedure*, Appellant **AMALIA MUSICO** respectfully moves for rehearing or for clarification and for rehearing en banc of the decision rendered in this cause under date of September 8, 1982 for that said decision is contrary to Florida law and contrary to prior decisions of this Court. More particularly:

1. This case involves the upholding of a prenuptial agreement. Such agreements can only be upheld if they are the result of an "informed waiver" of marital rights. In this case the *only* evidence of record (including the evidence of the attorney who drafted the instrument) was to the effect that appellant's signature on the agreement was not a reflection of an informed and voluntary

act and that it would last only for one year. There was absolutely nothing presented to the contrary on these points. *Lutgert v. Lutgert*, 338 So.2d 1111 (Fla. 2 DCA 1976) is the law of Florida, and that case mandates that a presumption of overreaching *must* be applied under such circumstances.

Now, it is black letter law that the parties to an antenuptial agreement do not deal at arms length with each other. Their relationship is one of mutual trust and confidence. . . . Moreover, a presumption of undue influence or overreaching arises in transactions or contracts between persons in such a confidential relationship when it is clear that the *dominant party thereto is the grossly disproportionate beneficiary of the transaction.* . . .

\* \* \* \*

The presumption which arises in these cases operates against the party receiving such benefit and imposes upon him the burden of coming forth with evidence sufficient to rebut it to the extent necessary to avoid its preponderating on the issue to which it relates.

\* \* \* \*

The device of a presumption such as that we employ here is the prevalent judicial tool commonly used in the determination vel non of undue influence or overreaching in transactions arising out of confidential relationships.

\* \* \* \*

The question here is not whether the wife *knew* what she was signing or what she was or was not getting. The agreement is clear on its face and she can't be heard to deny its contents. The question is whether she in the free exercise of her will, *voluntarily* signed it. (Emphasis added)

*Id.* at 115-16.

The per curiam decision directly conflicts with *Lutgert*. Had *Lutgert* properly been applied, appellee would have had the burden of coming forward with evidence showing that the agreement was fair. As it were, the presumption was not applied, the burden never shifted, and consequently *no* evidence was ever introduced (or was even required by the trial court) to establish the fairness of the agreement.

2. Since the undisputed facts of this case fall squarely within the setting of *Lutgert*, and further since *Lutgert* was not applied, the per curiam decision here is in direct conflict with the Court's recent decisions of *Fleming v. Fleming*, 408 So.2d 240 (Fla. 4th DCA 1982) and *Baker v. Baker*, 394 So.2d 465 (Fla. 4th DCA 1981). However, neither case has been cited by the Court. In *Fleming* the Court said:

On appeal, Mrs. Fleming contends that she was urged to make a determination quickly and without thought and was, in effect, coerced by Patterson [her own lawyer] to accept the third settlement offer. She suggests that Patterson was not prepared for trial and it was this unpreparedness which motivated him to urge her acceptance of the offer. *More basically, she asserts that the trial court should have considered the fairness of the parties' settlement agreement before determining whether it should be rescinded or vacated.*

The landmark case on this subject is, of course, *Del Vecchio v. Del Vecchio*, 143 So.2d 17, 20-21 (Fla. 1962) where the court stated:

Ordinarily the burden of proof of the invalidity of a prenuptial contract is on the wife alleging it but *if, on its face, the contract is unreasonable* a presumption of concealment arises, the burden shifts and it is incumbent upon the husband to prove validity. (emphasis supplied)

This concept was reiterated and expanded on by this court in *Baker v. Baker*, 394 So.2d 465, 466-67 (Fla. 4th DCA 1981) . . .

\* \* \* \*

Clearly, then, in a case where an agreement is alleged to be *patently unfair*, as here, the first order of business is for a court to make a determination as to whether the provisions made for a wife on the face of an agreement are, in the language of *Del Vecchio*, "disproportionate to the means of the husband." 143 So.2d at 20. If the agreement is found to be unreasonable on its face, the presumption that the husband concealed assets would arise and this, in turn, would shift the burden of proof to him to establish the validity of the agreement. Since, by the trial court's own admission, *no determination as to the fairness of the agreement was made herein*, we reverse and remand for consideration of this issue. (Emphasis added).

In *Fleming*, Judge Beranek, also a member of the panel in *Musico*, saw the "fairness" issue exactly. He said:

I concur specially to note that the former wife's contentions regarding duress were directed primarily at her own lawyer rather than at her former husband or opposing counsel. Despite this, *the trial court erred in failing to consider the alleged facial unfairness of the settlement agreement . . .*

Like *Fleming*, the *Musico* agreement is facially unfair because appellant receives nothing under its terms. Yet the Court failed to recognize this. Moreover, in this case appellant had no lawyer at all. The decision is therefore in direct conflict with *Fleming*.

In *Baker*, Judge Hurley, also a member of the panel in *Musico*, said:

While a marital relationship remains in a non-adversarial stance, each party has *fiduciary-like* responsibility to the other. As noted by the court in *Del Vecchio v. Del Vecchio, supra*, 143 So.2d at 21:

The relationship between the parties to an *antenuptial* [or postnuptial] agreement is one of mutual trust and confidence. Since they do not deal at arm's length they must exercise a high degree of good faith and candor in all matters bearing upon the contract.

The fact that Mrs. Baker was *unrepresented by counsel*, only underscores the necessity for *full compliance* with the fiduciary responsibilities inherent in the marital relationship. See *Fuller v. Fuller*, 68 So.2d 177 (Fla. 1953); *Zakoar v. Zakoar*, 240 So.2d 193 (Fla. 4th DCA 1970). (emphasis added)

*Id.* at 468

The decision is also in direct conflict with *Baker* since there was *no* evidence presented that Mr. Musico even tried to, much less succeeded at, fulfilling his "fiduciary-like" responsibility to his wife.

3. The significance of *In re Warren's Estate*, 229 N.Y.S.2d 1004 (App.Div. 2d 1962) *aff'd*, 236 N.Y.S.2d 628 (N.Y. 1962), has been overlooked. The court in *Warren* held that property rights vest as of the date of death. Therefore, in order for a waiver of marital rights to be effective to bar the election rights of a surviving spouse, it must satisfy the formalities of execution *prior* to the date of the deceased spouse's death. This was not recognized in *Maul* (relied upon in the Court's opinion) because the point was never raised in that case. Discussion of the facts in *Maul* only incidentally discloses that the time of acknowledgment was after the death of the husband. *Warren* was decided twenty years after *Maul*, it considered and rejected *Maul* and is therefore the controlling law in New York on this point. At best, failure

to recognize *Warren* as controlling would be violative of Article IV, Section One of the United States Constitution requiring "full faith and credit" to be given to judicial proceedings of our sister states.

4. Regarding appellant's homestead argument, *Florida Statutes*, § 689.01 expressly proscribes the waiver or release of *any* interest in real property other than by instrument in writing and signed in the presence of two subscribing witnesses. In order to affirm in this case, *Kyle v. Kyle*, 128 So.2d 427 (Fla. 2d DCA, 1961), *aff'd* 139 So.2d 885, must have been overlooked or it has to have been tacitly overruled without mention. Appellant is at a total loss to understand the basis for the Court's ruling on this point since no reasoning for the affirmance on this ground has been stated, and neither statutes nor cases have been cited.

5. It is respectfully submitted that as to paragraphs three and four above, the flaws in execution are substantive defects, and not mere "procedural irregularities". This characterization by the Court is tantamount to saying that the requirement of two witnesses to a deed is merely procedural. That is not the law of Florida.

6. If the Court does not wish to rehear the case, then it is most respectfully requested that the opinion be clarified so that appellant can be afforded the opportunity to seek further review of the case in the Florida Supreme Court. Implicit in the Fourth District's affirmance is a holding which directly conflicts with *Lutgert*, *Fleming*, *Baker* and *Kyle*. The discretionary review of the Supreme Court can only be invoked under such circumstances, however, if the direct conflict also expressly sets forth the basis therefor. Thus, if rehearing is not granted, appellant is most hopeful that the Court will entertain this motion as being one for clarification and requests that it set forth specific reasons for its ruling so that discretionary review in the Florida Supreme Court can be sought.



STATEMENT FOR REHEARING EN BANC

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of this Court and that a consideration by the full Court is necessary to maintain uniformity of decisions in this Court.

*Fleming v. Fleming*, 408 So.2d 240 (Fla. 4th DCA 1982); *Baker v. Baker*, 394 So.2d 465 (Fla. 4th DCA 1981).

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a copy of the foregoing has been furnished, by mail, to JAMES O. MURPHY, ESQUIRE, English, McCaughan & O'Bryan, Attorneys for the Appellee, P. O. Box 14098, Fort Lauderdale, Florida 33302, this 23 day of September 1982.

McCUNE, HIAASEN, CRUM, FERRIS  
& GARDNER, P.A.  
Attorneys for Appellant, MUSICO  
Post Office Box 14636  
Fort Lauderdale, Florida 33302  
(305) 462-2000

By /s/ John R. Hargrove  
JOHN R. HARGROVE

APPENDIX E

Denial of Petition for Rehearing

---

IN THE DISTRICT COURT OF APPEAL  
OF THE STATE OF FLORIDA  
FOURTH DISTRICT

Case No. 81-1410

AMALIA MUSICO,  
*Appellant/Cross-Appellee,*

v.

FRANCIS G. MUSICO, JR., ETC.,  
*Appellee/Cross-Appellant.*

December 10, 1982

BY ORDER OF THE COURT:

ORDERED that Appellant's September 23, 1982 Motion for Rehearing or Clarification is denied.

I hereby certify the foregoing is a true copy of the original court order.

/s/ Clyde L. Heath  
CLYDE L. HEATH  
Clerk

cc: John R. Hargrove, Esq.  
James O. Murphy, Esq.

**APPENDIX F**  
**Prenuptial Agreement**

---

**PRENUPTIAL AGREEMENT**

AGREEMENT made in the City of New York, state of New York, this 2nd day of December, 1966, between FRANCIS G. MUSICO, residing at 428 Roosevelt Avenue, in the City of Freeport, State of New York and AMALIA HORACEK, residing at 1850 South Ocean Boulevard, in the City of Fort Lauderdale, State of Florida.

**WITNESSETH:**

WHEREAS, the parties hereto have known each other for a period of time, and desire to marry, providing each waives the right of election to take against any Last Will and Testament of the other; and

WHEREAS, each of the parties represents that his or her attorney, as the case may be, has privately, and without the other being present, read and explained to such party the provisions of Section 18 of the Decedent Estate Law of the State of New York, wherein it is provided, among other things, that in the event a testator dies after August 31, 1930, and leaves a Will thereafter executed and leaves surviving a husband or wife, a personal right of election is given to the surviving spouse to take his or her share of the estate as in intestacy, subject to the limitations, conditions and exceptions contained in said section; and

WHEREAS, each of the parties further represents that his or her attorney, as the case may be, has privately, and without the other being present, read and explained to such party the provisions of Section 83 of the Decedent Estate Law of the State of New York, wherein, among other things, is set forth the manner of distributing a

decedent's property, if not devised or bequeathed, and more particularly as the same relates to a surviving spouse; and

WHEREAS, Francis G. Musico is the owner of real estate in the State of New York and in the State of Florida, having an estimated value of \$100,000.00 and the owner of shares of stock in various corporations which own, operate, manage and control 70 taxicabs in the City of New York and such shares of stock have an estimated value of \$750,000.00; and

WHEREAS, Francis G. Musico has other assets in addition to the above, of approximately \$50,000.00; and

WHEREAS, each of the parties hereto recognizes that in the event of the death of the other and providing they shall first marry, the survivor may be entitled to share in such decedent's estate in an amount ranging from one-third of the estate to the entire estate depending upon what other distributees survive such decedent; and

WHEREAS, as a condition of marrying, the parties desire to enter into an agreement before marriage, waiving the right of election to take against any Last Will and Testament of the other whatsoever; and

WHEREAS, the parties desire by this agreement to mutually restrict the rights which each might otherwise have to take against the terms of the other's will, as such rights are set forth in the Decedent Estate Law of the State of New York, Section 18; and

WHEREAS, each desires to preserve his or her own right to dispose of his or her estate by will as though no marriage had ever taken place; and

WHEREAS, each party expressly desires to retain the power to have his or her estate vest in his or her legatees or devisees as may be prescribed by his, or her, Last Will and Testament; and

WHEREAS, each party desires to voluntarily and irrevocably waive, renounce, and surrender, all right, title, and interest, legal or otherwise, choate or inchoate, which each may have in any estate, real or personal, of the other, of which each might die seized, not only in respect of such property which each now owns, but also in respect of such property which each may hereafter acquire,

NOW, THEREFORE, in consideration of the mutual promises and agreements herein contained, it is agreed:

1. That the parties hereto shall become husband and wife.

2. That in addition to the mutual promises herein contained, and in further consideration of the contemplated marriage and the benefits thereby conferred upon the parties and the obligations thereby assumed, each of the parties hereto does waive the right of election to take against any Last Will and Testament of the other whatsoever.

3. That neither party shall have, or acquire any right, title, or claim in and to the real or personal estate of the other, and that each party hereto shall have the right to dispose of his or her property by Last Will and Testament or otherwise, as such party sees fit, free from any claim, domination, or cause of action of or arising in favor of the other party hereto, and that the estate of each party hereto, whether real or personal shall descend to or vest and belong to the person or persons, legatees or devisees, as prescribed in the Last Will and Testament of either, or as provided by the laws of the State of New York, as though no marriage had ever taken place between the said parties.

4. That upon the death of a party to this agreement, the other party does hereby agree to elect, forfeit, forego, and waive any statutory or intestate interest, or other right or interest, which would otherwise be conferred on or vested in him or her with respect to any property, real

or personal, now owned or hereafter acquired by the other party, and hereby does release the decedent and his or her estate from any and all intestate interest or distributive share which the survivor might otherwise become entitled to receive upon the death of the decedent; and each party hereto covenants and agrees that he or she, as the case may be, will permit any Will of the other party hereto to be probated and/or allow Letters of Administration to issue on the estate and effects of the other party hereto, with the same force and effect as if such party had predeceased the party who actually shall predecease the survivor of them.

5. That each party, hereto, insofar as the estate of the other party is concerned, does hereby waive any and all rights accruing under any section of the Decedent Estate Law of the State of New York, or that may hereafter accrue under such Decedent Estate Law or under any other law of the State of New York or under any law of any other State, Territory, or Possession of the United States of America, or under any law of any foreign nation, and does particularly, but without limitation, waive any and all rights, which have accrued or which may hereafter accrue to either party hereto, by reason of Section 18 of the said Decedent Estate Law of the State of New York, or by reason of any amendment thereto or extension thereof; and each party hereto does hereby specifically waive any and all rights of claims or election that such party may at any time have to take any share of the estate of the other party hereto under any law or under any circumstances whatsoever, with the same force and effect as though there had never been a marriage, one to the other.

6. That this waiver of the right to elect to take as against any Last Will or Testament herein contemplated shall apply to any Last Will or Testament hereafter made by the other party, and to present or after acquired property.

7. That this agreement shall be deemed to be made under, and shall be governed by the Laws of the State of New York in all respects.

8. That each of the parties hereto acknowledge receipt of a signed original or of a signed duplicate original of this agreement.

IN WITNESS WHEREOF, the parties hereto have set their hands the day and year first above written.

/s/ Francis G. Musico

/s/ Amalia Horacek

/s/ Witnessed by  
Nathan Dinkes

## APPENDIX G

Florida Constitution and Appellate Rules

---

Fla. Const. art. V, § 3(b)

(b) JURISDICTION.—The supreme court:

(1) Shall hear appeals from final judgments of trial courts imposing the death penalty and from decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.

(2) When provided by general law, shall hear appeals from final judgments entered in proceedings for the validation of bonds or certificates of indebtedness and shall review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.

(3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

(4) May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

(5) May review any order of judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.



(6) May review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida.

(7) May issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction.

(8) May issue writs of mandamus and quo warranto to state officers and state agencies.

(9) May, or any justice may, issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge.

**Fla.R.App.P. 9.030. Jurisdiction of Courts**

**(a) Jurisdiction of Supreme Court.**

**(1) Appeal Jurisdiction.**

**(A) The Supreme Court shall review, by appeal:**

**(i) final orders of courts imposing sentences of death;**

**(ii) decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.**

**(B) When provided by general law, the Supreme Court shall review:**

**(i) by appeal final orders entered in proceedings for the validation of bonds or certificates of indebtedness;**

**(ii) action of statewide agencies relating to rates or service of utilities providing electric, gas or telephone service.**

(2) Discretionary Jurisdiction. The discretionary jurisdiction of the Supreme Court may be sought to review:

(A) decisions of district courts of appeal that:

(i) expressly declare valid a state statute;

(ii) expressly construe a provision of the state or federal constitution;

(iii) expressly affect a class of constitutional or state officers;

(iv) expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law;

(v) pass upon a question certified to be of great public importance;

(vi) are certified to be in direct conflict with decisions of other district courts of appeal;

(B) orders and judgments of trial courts certified by the district court of appeal in which the appeal is pending to require immediate resolution by the Supreme Court, and:

(i) to be of great public importance, or

(ii) to have a great effect on the proper administration of justice;

(C) questions of law certified by the Supreme Court of the United States or a United States Court of Appeals that are determinative of the cause of action and for which there is no controlling precedent of the Supreme Court of Florida.